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In the Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM J. CLINTON,
PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONER

v.

JAMES T. GOLDSMITH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

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70 pp

QUESTIONS PRESENTED

In Section 563 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Tit. XI, § 563(a)(1)(A) and (b)(1), 110 Stat. 325, Congress authorized the President to drop from the rolls of the armed forces, and thereby terminate the military status and pay of, any commissioned officer who has been sentenced to confinement for more than six months by court-martial, after the officer's conviction has become final and the officer has served in confinement for a period of six months. 10 U.S.C. 1161(b)(2), 1167. The questions presented are:

1. Whether the Court of Appeals for the Armed Forces has jurisdiction under the All Writs Act, 28 U.S.C. 1651(a), to bar the President from exercising his authority to drop a commissioned officer from the rolls under 10 U.S.C. 1161(b)(2) and 1167.

2. Whether the President's exercise of authority under 10 U.S.C. 1161(b)(2) and 1167 in this case would violate the Double Jeopardy Clause of the Fifth Amendment or the *Ex Post Facto* Clause, U.S. Const. Article I, Section 9, Clause 3.

PARTIES TO THE PROCEEDING

Petitioners are William J. Clinton, President of the United States; William S. Cohen, Secretary of Defense; F. Whitten Peters, Acting Secretary of the Air Force; Lieutenant General David W. McIlvoy, Vice Commander, HQ Air Education and Training Command, Randolph Air Force Base, Texas. Petitioners were named as respondents/appellees in the court of appeals. All petitioners appear in their official capacities only. The claims against the following individuals were dismissed by the court of appeals as moot: Robert M. Walker, Acting Secretary of the Army; Colonel Marvin Nickels, Commandant, U.S. Disciplinary Barracks, Fort Leavenworth, Kansas; and Colonel Gatrell, Commander, Munson Army Hospital, Fort Leavenworth, Kansas.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 48 M.J. 84. The order of the Air Force Court of Criminal Appeals (App., *infra*, 22a-24a) is unreported. A prior opinion of the Air Force Court of Criminal Appeals affirming respondent's court-martial conviction (App., *infra*, 30a-38a) is unreported.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Armed Forces was entered on April 29, 1998. On July 21, 1998, Chief Justice Rehnquist

extended the time within which to file a petition for a writ of certiorari to and including August 27, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant statutory and constitutional provisions are reproduced at App., *infra*, 39a-42a.

STATEMENT

Following trial by a general court-martial, respondent was convicted of willfully disobeying a "safe sex" order from a superior officer, assault with means likely to produce death or grievous bodily harm, and assault consummated by a battery, in violation of Articles 90 and 128 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 890, 928. He was sentenced to six years' confinement and forfeiture of $2,500 pay per month for 72 months. The Air Force Court of Criminal Appeals affirmed the conviction, and respondent sought no further review of that decision. The Air Force then initiated action to drop respondent from the rolls of the Air Force because of his court-martial conviction and sentence. On respondent's application, the Court of Appeals for the Armed Forces issued an extraordinary writ under the All Writs Act, 28 U.S.C. 1651(a), barring the President from dropping respondent from the rolls of the Air Force.

1. The President, as Commander in Chief of the Armed Forces, commissions all officers of the military. U.S. Const., Art. II, § 3. Since 1870, the President also has had the authority to drop from the rolls of the Army any officer who has been absent from duty for three months without leave. Act of July 15, 1870, ch. 294, § 17, 16 Stat. 319. In 1911, Congress extended the

President's authority to drop from the Army's rolls officers who have been absent in confinement in a prison or penitentiary after final conviction by a civilian court. Act of Jan. 19, 1911, ch. 22, 36 Stat. 894; see also Act of Apr. 2, 1918, ch. 39, 40 Stat. 501 (authorizing President to drop from the rolls of the Navy and Marine Corps officers who have been absent from duty without leave for three months or more or found guilty by civilian authorities of any offense); Act of May 5, 1950, ch. 169, § 10, 64 Stat. 146 (authorizing President to drop from the rolls "of any armed force" officers who have been absent without authority for at least three months or finally sentenced to confinement in a Federal or State penitentiary or correctional institution).

On February 10, 1996, as part of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Tit. XI, § 563(a)(1)(A) and (b)(1), 110 Stat. 325, codified at 10 U.S.C. 1161(b)(2) and 1167, Congress expanded the President's authority to drop officers from the rolls. Section 1161(b)(2) authorizes the President to "drop from the rolls of any armed force any commissioned officer * * * who may be separated under section 1167 of this title by reason of a sentence to confinement adjudged by a court-martial." 10 U.S.C. 1161(b)(2). Section 1167 in turn provides that "a member sentenced by a court-martial to a period of confinement for more than six months may be separated from the member's armed force at any time after the sentence to confinement has become final * * * and the member has served in confinement for a period of six months." 10 U.S.C. 1167.

2. Respondent is a commissioned officer in the United States Air Force serving in the rank of Major. After he was diagnosed as HIV-positive, his superior commissioned officer ordered him to inform sexual partners of his HIV status and to employ methods,

including condoms, to prevent the transfer of bodily fluids during sexual relations. App., *infra*, 31a. Respondent nevertheless had unprotected vaginal intercourse with a fellow officer and a civilian without informing them that he was HIV-positive. Respondent was thereafter tried by general court-martial on two specifications of willfully disobeying a "safe sex" order from a superior officer, two specifications of assault with a means likely to produce death or grievous bodily harm, and one specification of assault on a superior commissioned officer, in violation of 10 U.S.C. 890 and 928. Respondent was convicted as charged, except that he was acquitted of assault on a superior officer and instead convicted of the lesser-included offense of assault consummated by battery. On March 4, 1994, respondent was sentenced to six years' confinement and forfeiture of $2,500 pay per month for 72 months. On November 20, 1995, the Air Force Court of Criminal Appeals affirmed the conviction. Respondent did not seek further review of that decision, and his conviction therefore became final. See 10 U.S.C. 867(b); Rule 1209(a) of the Rules for Courts-Martial. Respondent was incarcerated at the United States Disciplinary Barracks at Fort Leavenworth, Kansas. App., *infra*, 2a.

On or before December 18, 1996, the Air Force notified respondent that it had initiated action under Section 1161(b)(2) to drop him from the rolls of the Air Force on the basis of his final court-martial conviction and confinement. App., *infra*, 25a-29a. On December 20, 1996, while serving in confinement, respondent petitioned the Air Force Court of Criminal Appeals for extraordinary relief under the All Writs Act, 28 U.S.C. 1651(a), alleging that his receipt of HIV medication had been interrupted. On January 9, 1997, the Air Force Court of Criminal Appeals denied the petition for lack

of jurisdiction. App., *infra*, 22a-24a. On January 23, 1997, respondent filed a combined Petition for Extraordinary Relief and Writ Appeal in the United States Court of Appeals for the Armed Forces, reiterating his claims with regard to his medication, and arguing for the first time that the Air Force's action to drop respondent from its rolls violated the Double Jeopardy and *Ex Post Facto* Clauses. Respondent argued that because his court-martial conviction triggered the Air Force's action to drop him from the rolls, Sections 1161(b)(2) and 1167, which were enacted after his conviction, imposed an *ex post facto* punishment. He similarly contended that the provisions violated the Double Jeopardy Clause because they authorized the infliction of successive punishment based on the same conduct underlying his conviction. App., *infra*, 13a; Resp. C.A. Br. A1-6 to A1-9.

On August 25, 1997, the court of appeals issued an order staying any administrative action to drop respondent from the rolls. App., *infra*, 20a-21a. In October 1997, respondent's sentence expired and he returned to duty status.

3. The court of appeals denied respondent's writ-appeal petition as moot and, by a three-to-two vote, granted his petition for extraordinary relief barring the President from taking action to drop respondent from the rolls. App. *infra*, 1a-19a. The court of appeals rejected the Air Force's contention that the court lacked All Writs Act jurisdiction to entertain respondent's requests for extraordinary relief because the challenged matters constitute "administrative actions which are separate and apart from the processing of any matter against [respondent] under the Uniform Code of Military Justice." Gov't C.A. Br. 9. The court of appeals noted that its earlier decisions had recognized a "broad responsibility with respect to admini-

stration of military justice," and had found jurisdiction to review via the All Writs Act "a case that [the court] cannot possibly review directly." App., *infra*, 5a-6a. The court concluded that it is thus "empowered by the All Writs Act to grant extraordinary relief in a case in which the court-martial rendered a sentence that constituted an adequate basis for direct review in this Court after review in the intermediate court." *Id.* at 6a.

The court then held that respondent at least initially was entitled to bring a writ-appeal petition raising his medical treatment claim, even though his "release from confinement has now mooted his claim." App., *infra*, 8a. The court further found that respondent's failure to raise in the Court of Criminal Appeals his challenge to the Air Force's personnel action was not fatal to the court of appeals' jurisdiction. The court explained that, "consistent with the concept of 'pendent jurisdiction,'" respondent's "proper filing in this Court of a writ-appeal petition as to suspension of necessary medications allowed him to 'piggyback' thereon * * * the issue of lawfulness of dropping him from the rolls of the Air Force." *Id.* at 9a.

Turning to the merits of respondent's challenge to Sections 1161 and 1167, the court of appeals acknowledged that the President's statutory authority to drop an officer from the rolls is "not labeled 'punishment,'" but "[i]nstead * * * is part of a chapter of Title 10 which concerns 'Personnel.'" App., *infra*, 14a. Nevertheless, the court held that, "[a]lthough the issue is a close one, * * * in order fully to accomplish the purposes of the *Ex Post Facto* and Double Jeopardy Clauses," the Air Force's action to drop respondent from the rolls based on a court-martial conviction should be treated as "punitive." *Ibid.* The court explained that Congress enacted Sections 1161 and 1167 as part of the same public law that added Article

58b, 10 U.S.C. 858b, which mandates the forfeiture of military pay following a prescribed sentence imposed by court-martial. App., *infra*, 14a. The court also observed that in *United States* v. *Gorski*, 47 M.J. 370 (C.A.A.F. 1997), it had held that Article 58b is a punitive sanction under the UCMJ that is subject to the *Ex Post Facto* Clause. App., *infra*, 13a. The court further reasoned that an action to drop an officer from the rolls involves a "stigma very akin to that involved in 'punishment.'" *Id.* at 14a. The court of appeals therefore held that "under all the circumstances surrounding enactment of Pub. L. No. 104-106, the provision for 'dropping from the rolls' was 'punitive' for purposes of the Double Jeopardy Clause and, *a fortiori*, for purposes of the *Ex Post Facto* Clause." *Id.* at 15a n.10. In a footnote, the court stated that those same statutory "circumstances" also sufficed to distinguish *Hudson* v. *United States*, 118 S. Ct. 488 (1997), in which this Court had found that an occupational debarment sanction imposed on individuals administratively for their banking violations did not constitute "punishment" under the Double Jeopardy Clause. App., *infra*, 15a n.10.

Judges Cox and Sullivan filed separate concurrences. App., *infra*, 15a-17a. Judge Cox wrote to respond to the dissent's criticism that the court lacked jurisdiction under the All Writs Act to review an "administrative action" to drop an officer from the rolls. App., *infra*, 15a. In his view, the court's "jurisdiction extends only to the Constitutional *ex post facto* question." *Id.* at 16a. Judge Sullivan emphasized the court's "responsibility of protecting the rights of all servicemembers in court-martial matters," especially "when a 'second punishment,' directly tied to [a] court-martial, is imposed * * * by an *ex post facto* law." *Id.* at 17a.

Judge Gierke, joined by Judge Crawford, dissented. App., *infra*, 17a-19a. They observed that "[d]ropping an officer from the rolls (DFR) traditionally has been treated as an administrative measure separate from the court-martial," and unlike the provision at issue in *United States* v. *Gorski*, *supra*, "[Section] 1167 is not part of the Uniform Code of Military Justice but, instead, is part of the United States Code pertaining to personnel matters." App., *infra*, 17a-18a. In their view, dropping an officer from the rolls is purely an "administrative personnel decision, in the same category as a decision to not promote the officer, to reassign the officer, to revoke the officer's security clearance, or to administratively separate the officer for substandard performance." *Id.* at 19a. Thus, Judges Gierke and Crawford would have held that the court lacked jurisdiction to review the Air Force's action to drop respondent from the rolls. *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals invalidated on constitutional grounds an Act of Congress authorizing the President to drop an officer from the rolls of the armed forces based on the officer's final conviction by court-martial. That holding conflicts with this Court's decisions, which recognize that the Double Jeopardy and *Ex Post Facto* Clauses apply only to *criminal* laws. It also conflicts with the decisions of the circuit courts of appeals, which have held that a servicemember's administrative discharge from the military is not a criminal proceeding implicating double jeopardy concerns. The holding deprives the President of an administrative procedure for removing from military duty officers who have been incarcerated for committing serious crimes and thus either are unavailable for useful military service or whose continued service would be incompatible with

the military's standards of conduct for officers. The court of appeals' decision is also flawed in holding that the All Writs Act provides a jurisdictional basis for the court to review the constitutionality of an administrative personnel action. Congress specifically limited the jurisdiction of the Court of Appeals for the Armed Forces to direct review of certain court-martial cases. The court's expansion of its jurisdiction beyond those limits and into military personnel matters conflicts with the language of the All Writs Act and the Court's precedents limiting the applicability of the Act to cases within a court's jurisdiction. Accordingly, this Court's review is warranted.

1. The court of appeals lacked jurisdiction over respondent's challenge to the constitutionality of Sections 1161(b)(2) and 1167. The Court of Appeals for the Armed Forces (formerly, the Court of Military Appeals) is an Article I court whose jurisdiction is limited to court-martial cases reviewed by a Court of Criminal Appeals involving specific types of sentences: a sentence of death; a sentence including dismissal of a commissioned officer; a sentence including the punitive discharge of an enlisted servicemember; or a sentence to confinement for one year or more. 10 U.S.C. 866(b), 867(a); *Weiss* v. *United States*, 510 U.S. 163, 168 (1994); *Parisi* v. *Davidson*, 405 U.S. 34, 41 n.7, 44 (1972). The Court of Appeals for the Armed Forces thus "may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." 10 U.S.C. 867(c).

There is no dispute that the court of appeals lacked jurisdiction under 10 U.S.C. 867 to hear respondent's challenge to the Air Force's personnel action to drop him from the rolls; that action is not part of a sentence adjudged by a court-martial. Nor does the court of

appeals have jurisdiction over respondent's challenge pursuant to the All Writs Act, 28 U.S.C. 1651(a). That Act authorizes courts to issue writs "in aid of their respective jurisdictions," 28 U.S.C. 1651(a). That language means that courts may issue writs only in cases otherwise within their jurisdiction; it does not expand the bases for jurisdiction. See *Pennsylvania Bureau of Correction* v. *United States Marshals Serv.*, 474 U.S. 34, 41 (1985) (Act does not authorize review "where jurisdiction [does] not lie under an express statutory provision"); see also *McClung* v. *Silliman*, 19 U.S. (6 Wheat.) 598, 601 (1821) (the Act "vest[s] the power * * * in cases where the jurisdiction already exists"); *Jackson* v. *Vasquez*, 1 F.3d 885, 889 (9th Cir. 1993) ("An order is not authorized under the Act unless it is designed to preserve jurisdiction that the court has acquired from some other independent source in law.").[1] Accordingly, the court of appeals erred in invoking the All Writs Act "in a case that it cannot possibly review directly." App., *infra*, 6a.

The court of appeals has asserted a broad, and erroneous, view of its All Writs Act authority in a number of cases that fall outside the limits of 10 U.S.C. 867. See, *e.g.*, *Fletcher* v. *Covington*, 42 M.J. 215 (C.A.A.F. 1995) (issuing stay in Article 15 proceedings over which court of appeals has no jurisdiction); *Unger*

[1] This Court therefore has recognized "the power of the Court of Military Appeals to issue an emergency writ * * * in cases * * * which may ultimately be reviewed by that court," and cautioned that "[a] different question would, of course, arise in a case which the Court of Military Appeals is not authorized to review under the governing statutes." *Noyd* v. *Bond*, 395 U.S. 683, 695 n.7 (1969); cf. *Parisi* v. *Davidson*, 405 U.S. at 44-45 (noting "conceptual difficulty" with Court of Military Appeals' jurisdiction under the All Writs Act to consider a servicemember's claim for discharge from the military as a conscientious objector).

v. *Ziemniak*, 27 M.J. 349, 351 (C.M.A. 1989) (exercising jurisdiction over special court-martial while acknowledging that case does not "qualify for review" under 10 U.S.C. 867); *United States Navy-Marine Corps Court of Military Review* v. *Carlucci*, 26 M.J. 328, 330-334 (C.M.A. 1988) (reviewing Department of Defense Inspector General's judicial corruption investigation); see also App., *infra*, 5a n.3. The effect of that expansive and incorrect view is to propel the court of appeals into military personnel matters over which it has no proper cognizance.

Here, respondent sought extraordinary relief from the Air Force's *personnel* action to drop him from the rolls, which was not part of respondent's sentence imposed by court-martial. Indeed, respondent brought his petition against the President, the Secretary of Defense, and other officials who were not even parties to the court-martial, and he sought relief after his court-martial conviction had become final through the lapse of time to appeal under 10 U.S.C. 867(b). See also 10 U.S.C. 1167 (authorizing separation only "after the sentence to confinement has become final under [the UCMJ]"). Accordingly, the court of appeals' writ preventing the Air Force from dropping respondent from its rolls was not "necessary or appropriate in aid of" the court's limited jurisdiction under 10 U.S.C. 867 to review court-martial convictions. While the court has said that it has "broad responsibility with respect to administration of military justice," App., *infra*, 5a, no such general view of its mission can authorize it to overrun statutory limits on its jurisdiction.[2]

[2] The breadth of the court's view of its All Writs Act power is underscored by its assertion of jurisdiction over respondent's challenge to the Air Force's personnel action based on a theory that such a claim is "pendent" to respondent's claim that he

Under the jurisdictional theory applied in this case, the Court of Appeals for the Armed Forces could review any servicemember's challenge to a personnel action, such as a loss of a security clearance or non-selection for promotion, as long as the servicemember claims that he is being sanctioned for conduct for which he was previously convicted by a court-martial. The court's holding thus permits it to adjudicate constitutional claims that arise not from the court-martial itself, but from collateral consequences of the conviction within the military. Such an expansive concept of jurisdiction conflicts with Congress's assignment of the responsibility for reviewing such claims to the federal district courts or the Boards for Correction of Military Records under 10 U.S.C. 1552. See generally *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983); *Holley* v. *United States*, 124 F.3d 1462 (Fed. Cir. 1997); *Guerra* v. *Scruggs*, 942 F.2d 270 (4th Cir. 1991).

2. a. On the merits, the court of appeals erred in holding that an action to drop an officer from the rolls on the basis of a prior conviction was "punitive" for

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received improper medical treatment while in confinement. App., *infra*, 9a. As an initial matter, the court of appeals lacked jurisdiction over respondent's medical treatment claim, because the court may act only with respect to "the findings and sentence as approved by the convening authority." 10 U.S.C. 867(c). Moreover, respondent's conviction was already final at the time of the filing of the petition for extraordinary relief. In any event, respondent's challenge to the constitutionality of 10 U.S.C. 1161(b) and 1167, which petitioner raised for the first time in the court of appeals, is not sufficiently related to his challenge to his medical treatment to constitute a pendent claim. See generally *Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 51 (1995); *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 725 (1966); cf. 28 U.S.C. 1367(a) (providing for supplemental jurisdiction over pendent claims and parties when claims are "so related * * * that they form part of the same case or controversy").

purposes of the Double Jeopardy and *Ex Post Facto* Clauses. Those Clauses apply to only criminal laws or proceedings. *Hudson* v. *United States*, 118 S. Ct. 488, 493 (1997) ("We have long recognized that the Double Jeopardy Clause does not prohibit the imposition of any additional sanction that could, in common parlance, be described as punishment. The Clause protects only against the imposition of multiple *criminal* punishments for the same offense.") (internal quotations marks and citation omitted); *Kansas* v. *Hendricks*, 117 S. Ct. 2072, 2081 (1997) (Double Jeopardy and *Ex Post Facto* Clauses apply to "criminal proceedings"); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594 (1952) ("It has always been considered that [the *Ex Post Facto* Clause] forbids * * * penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment."); see also *Calder* v. *Bull*, 3 U.S. (3 Dallas) 386, 390 (1798).

As this Court recently made clear, the question whether a particular sanction is criminal or civil is initially a matter of legislative intent. *Hudson*, 118 S. Ct. at 493. If the legislature intends to create a civil sanction, that is the end of the matter unless there is "the clearest proof" that "the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." *Ibid.* (internal quotation, brackets, and citations omitted); see also *Kansas* v. *Hendricks*, 117 S. Ct. at 2081-2082; *United States* v. *Ursery*, 518 U.S. 267, 288 (1996); *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980). In conducting the latter inquiry, the factors identified in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), and subsequent cases provide guidance; those factors include whether the sanction historically has been regarded as punishment; whether it involves an affirmative disability or re-

straint; whether it promotes the traditional goals of punishment; and whether it is proportionate to a non-punitive purpose. See, *e.g.*, *Hudson*, 118 S. Ct. at 495-496; *Kansas* v. *Hendricks*, 117 S. Ct. at 2082-2083. The fact that the conduct being sanctioned may also constitute a crime or that the sanction was intended to deter similar conduct "is insufficient to render a sanction criminal." *Hudson*, 118 S. Ct. at 496; see also *Kansas* v. *Hendricks*, 117 S. Ct. at 2082; *Ursery*, 518 U.S. at 292.

b. Under that analytical framework, an action to drop an officer from the rolls is not a punitive measure subject to double jeopardy and *ex post facto* restrictions. Congress clearly intended 10 U.S.C. 1161(b)(2) and 1167 to be a civil remedy. Sections 1161(b)(2) and 1167 are not contained in the Uniform Code of Military Justice, 10 U.S.C. 801-946. See App., *infra*, 14a. Instead, Sections 1161 and 1167 are included in Chapter 59 of Title 10 of the U.S. Code, which is entitled "Separation" and concerns military personnel matters. Before 1996, Section 1161 had authorized the President to drop from the rolls officers absent without leave or convicted by a civilian court. In 1996, Congress amended Section 1161 and enacted Section 1167 to extend that authority to certain officers convicted by courts-martial; it did so as part of Title V of the National Defense Authorization Act for Fiscal Year 1996, which is entitled "Military Personnel Policy." Pub. L. No. 104-106, 110 Stat. 290; see also App., *infra*, 3a (referring to Air Force's "*administrative* action to drop [respondent] from its rolls") (emphasis added). Congress's classification of an action to drop officers from the rolls as an administrative personnel action, rather than as a feature of a court-martial sentence under the UCMJ, reveals that Congress regarded that action to be civil in character. See *Kansas* v. *Hendricks*, 117 S. Ct. at 2082 (Kansas's placement of involuntary commitment proceedings in State's "probate code, instead of the criminal code" supported finding that legislature intended proceedings to be civil). Contrary to the court of appeals' view, it does not matter that this civil provision was enacted simultaneously with the provision that the court of appeals regarded as punitive. App., *infra*, 14a. Congress frequently provides both a civil and a criminal sanction for the same conduct. *Helvering* v. *Mitchell* 303 U.S. 391, 397-398 (1938) (no double jeopardy bar to civil and criminal sanction for tax evasion); cf. *FDIC* v. *Mallen*, 486 U.S. 230 (1988) (rejecting due process challenge to suspension of indicted bank officer).

There is no indication, much less "the clearest proof," *Hudson*, 118 S. Ct. at 493; *Kansas* v. *Hendricks*, 117 S. Ct. at 2082, that an action to drop an officer from the rolls is so punitive in purpose or effect as to negate Congress's intent to establish a civil, administrative scheme. In *Hudson*, the Court held that occupational debarment from the banking industry for banking violations was not punitive. 118 S. Ct. at 495. The same conclusion applies here. Dropping from the rolls has historically been regarded as remedial. It has long been recognized that "[t]he authority to drop is a special power conferred by Congress for the purpose of relieving the army of a useless member who has himself practically abandoned it, and the treasury from the obligation of paying for services no longer rendered." William Winthrop, *Military Law and Precedents* 746 (2d ed. 1920); see also 36 Op. Atty. Gen. 186, 188 (1930) (the purpose of an action to drop an officer from the rolls is "not to impose additional punishment upon naval officers convicted of crime, but rather to promote the efficiency of the Navy and to maintain the high standard of its officer personnel by providing that

officers who fail to maintain a certain standard of conduct may be dropped from the rolls and rendered ineligible for reappointment").

Moreover, in extending the conditions under which officers may be dropped from the rolls to include confinement for an extended period following a final court-martial conviction, Congress reasonably furthered the legitimate remedial objective of separating officers who are not performing any service for the military (because they are in confinement) or whose continuation in active service is inconsistent with good order and discipline. Dropping from the rolls imposes no affirmative disability or restraint "approaching the 'infamous punishment' of imprisonment." *Hudson*, 118 S. Ct. at 496 (quoting *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960)). And an administrative action to drop an officer from the rolls carries with it no characterization as to the conditions under which the officer was separated. It removes a person from the rolls of the military, without the stigma associated with criminal punishment. See App., *infra*, 26a (notifying respondent that his "service will not be characterized"); see also *Helmich* v. *Nibert*, 543 F. Supp. 725, 728 (D. Md. 1982) ("[S]eparation * * * by dropping * * * from the rolls * * * is clearly not equivalent to a discharge. It is purely a non-disciplinary administrative action which carries no connotations, good or bad.") (citation omitted).

The court of appeals' treatment of dropping from the rolls as "punishment" conflicts with the consistent view of the circuit courts of appeals that have held that a servicemember's discharge from the military is not criminal punishment. See *United States* v. *Rice*, 109 F.3d 151, 153 (3d Cir. 1997) (rejecting defendant's claim that a "general discharge was punishment and the functional equivalent of a criminal prosecution barring

subsequent prosecution for the same offense"); *United States* v. *Smith*, 912 F.2d 322, 323-324 (9th Cir. 1990) (rejecting claim that administrative discharge in lieu of court-martial barred subsequent criminal charges arising out of same conduct); cf. *United States* v. *Reyes*, 87 F.3d 676, 680 (5th Cir. 1996) (in rejecting double jeopardy challenge to conviction following civilian employee's suspension from military, court held "constitutional restrictions on governmental action in its capacity as an employer are not a persuasive basis on which to hold that 'punishment' for Double Jeopardy Clause purposes embraces adverse employment action taken by the government in its capacity as employer, rather than as sovereign"). In ruling that the Constitution forbids the President from dropping from the rolls officers who have been previously convicted of a crime, the Court of Appeals for the Armed Forces has departed from the uniform course of lower court decisions.

3. The constitutional principle embraced by the court of appeals not only conflicts with the Court's longstanding jurisprudence under the Double Jeopardy and *Ex Post Facto* Clauses; it also imposes an unwarranted intrusion upon the President's authority, as Commander in Chief, to enforce standards of behavior for those who serve as officers in the armed forces. The court of appeals' decision prevents the President from dropping from the rolls an officer who has committed a serious crime and thereby eliminates a basic tool provided by Congress to deal with the presence of a convicted officer in the military's leadership ranks.

Although the court of appeals' decision expressly prohibits only an action to drop an officer from the rolls, its reasoning has broader implications that could affect the military's ability to discharge any servicemember

on the basis of a prior court-martial conviction. A commissioned officer who is convicted in a court-martial and sentenced to more than six months' imprisonment is frequently given a sentence of dismissal. See Rule 1003(b)(9)(A) of the Rules for Courts-Martial (authorizing sentence including dismissal). Where a sentence of dismissal is not imposed, however, the military may initiate either an action to drop from the rolls or an administrative discharge proceeding under 10 U.S.C. 1181(b), which also results in the loss of military pay and status. There are distinctive substantive and procedural features of administrative discharge proceedings that underscore their remedial role in maintaining standards of conduct for military servicemembers.[3] Those features may lead the court of appeals to exempt administrative discharge proceedings from double jeopardy scrutiny. Nevertheless, given the court's broad reasoning that respondent's termination of military status and pay would be unconstitutional because it "result[s] from punitive action taken pursuant to the UCMJ," App., *infra*, 14a, the court may well extend its ruling in this case beyond an action to drop from the rolls under Section 1161(b)(2).

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[3] Section 1181 permits separation of officers because of "misconduct" or "moral or professional dereliction" or because the officer's "retention is not clearly consistent with the interests of national security." 10 U.S.C. 1181(b). The armed forces may employ similar administrative mechanisms to discharge enlisted members for misconduct. 10 U.S.C. 1169 (authorizing Secretary of an armed force to prescribe regulations for discharge of enlisted members); 32 C.F.R. Pt. 41, App. A. After the court of appeals stayed the Air Force's action to drop respondent from the rolls under Section 1161(b)(2), but before the court of appeals issued its decision, the Air Force instituted an administrative discharge proceeding against respondent under Section 1181. The military has deferred that proceeding pending the resolution of this case.

Even if the court of appeals does not extend its ruling to prohibit an administrative discharge proceeding under Section 1181 against respondent and other similarly situated officers, an administrative discharge proceeding is more cumbersome, time-consuming, and resource-intensive than an action to drop an officer from the rolls.[4] The court's decision thus impairs the President's ability to remove promptly an officer whose authority in the military chain of command has been undermined and whose service no longer furthers the military mission. See *Chappell* v. *Wallace*, 462 U.S. 296, 300 (1983) (noting that "no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting" and that "the established relationship between enlisted military personnel and their superior officers * * * is at the heart of the necessarily unique structure of the Military"); *Parker* v. *Levy*, 417 U.S. 733, 744 (1974) (recognizing that "a military officer holds a particular position of responsibility and command in the Armed Forces").

The court of appeals' holding raises matters fundamental to the administration of military personnel matters. Great deference is owed to the judgments of the political branches in this area. See, *e.g.*, *Weiss*, 510 U.S. at 177 (1994) ("Judicial deference * * * 'is at its apogee' when reviewing congressional decisionmaking"

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[4] For instance, an action under Section 1181 generally requires an evidentiary hearing before a convened Board of Inquiry during which the officer has a right to counsel and subsequent consideration by a Board of Review. 10 U.S.C. 1182-1185; Air Force Instruction 36-3206, Chs. 7-8 (Oct. 14, 1994). By contrast, an action to drop an officer from the rolls is a summary procedure in which the officer is notified of the action and has "10 calendar days to submit comments on his or her defense." Air Force Instruction 36-3207, Ch. 4.2.3 (May 29, 1997).

in the military context) (quoting *Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981)); *Loving* v. *United States*, 517 U.S. 748, 768-773 (1996). Despite that principle, the Court of Appeals for the Armed Forces, an Article I court, has invalidated on constitutional grounds an Act of Congress exercising the Legislative Branch's power under the Constitution to "make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, Cl. 14—and did so by extending its reach to personnel matters that fall outside the court's limited jurisdiction. Those holdings warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1998

APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

Misc. No. 97-8012
Crim.App. Misc. No. 96-14

JAMES T. GOLDSMITH, MAJOR,
U.S. AIR FORCE, PETITIONER/APPELLANT,

v.

PRESIDENT WILLIAM J. CLINTON;
SECRETARY OF DEFENSE WILLIAM S. COHEN;
ACTING SECRETARY OF THE AIR FORCE F. WHITTEN PETERS; ACTING SECRETARY OF THE ARMY ROBERT M. WALKER; LIEUTENANT GENERAL JOHN C. GRIFFITH, VICE COMMANDER, HQ AIR EDUCATION AND TRAINING COMMAND, RANDOLPH AIR FORCE BASE, TEXAS; COLONEL MARVIN NICKELS, COMMANDANT, U.S. DISCIPLINARY BARRACKS, AND COLONEL GATRELL, COMMANDER, MUNSON ARMY HOSPITAL, BOTH OF FORT LEAVENWORTH, KANSAS,
RESPONDENTS/APPELLEES

[Argued: Nov. 3, 1997
Decided: April 29, 1998]

Opinion of the Court

EVERETT, Senior Judge:

As a result of Major Goldsmith's participation in unprotected vaginal intercourse with two women—a fellow officer and a civilian—while he was HIV-positive, he was tried by general court-martial on two specifications of willfully disobeying a "safe sex" order from a superior officer, two specifications of assault with a means likely to produce death or grievous bodily harm, and one specification of assault on a superior commissioned officer. *See* Arts. 90 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 890 and 928, respectively. Contrary to his pleas, he was found guilty as charged, except that he was acquitted of assault on a superior officer and instead convicted of the lesser-included offense of assault consummated by a battery. His sentence was confinement for 6 years and forfeiture of $2,500.00 pay per month for 72 months. Under this sentence, which the convening authority approved as adjudged, Goldsmith was to remain in confinement as an Air Force officer for 6 years, less any subsequent remission of sentence or credit for good behavior, and he was to receive his regular monthly pay and allowances as a major, less the forfeitures imposed by the court-martial.

The Court of Criminal Appeals affirmed the findings and sentence of the court-martial, but Major Goldsmith did not petition this Court for review. Subsequently, on December 20, 1996, his counsel filed with the Court of Criminal Appeals a pleading styled "Writ Appeal Petition for Extraordinary Relief" and a "Brief to Support Writ Appeal Petition for Extraordinary Relief." The gravamen of this "petition" was that, at the Fort Leavenworth Disciplinary Barracks where Goldsmith was serving his sentence, an interruption had occurred in his receipt of an HIV medication. Petitioner's counsel represented then—as he also did during oral argument in our Court—that the failure to receive the medication was life-threatening.

On January 9, 1997, the Court of Criminal Appeals denied the petition by *per curiam* opinion. Two weeks later, Major Goldsmith filed with this Court the combined Petition for Extraordinary Relief and Writ Appeal now being considered. Therein, he not only reiterated his request that he be assured a continuous supply of HIV medication while in confinement, but he also asked this Court to prevent his being dropped from the rolls of the Air Force pursuant to the provisions of a recently enacted law. *See* 10 U.S.C. §§ 1161 and 1167. Petitioner named as respondents the President and various other members of the Executive Branch.

Soon after receiving the petition, this Court entered an order directing the deferral of any administrative action to drop petitioner from the rolls. Then the Court heard argument on the petition with respect to the issue of the constitutionality of applying to Major Goldsmith a statute which was enacted after his offenses had been committed and also after the adjudging of his sentence. During the argument, we were informed by petitioner's counsel that he had been released from confinement and is now performing duty as a commissioned officer while the Air Force prepares to proceed with administrative action to drop Goldsmith from its rolls whenever this Court allows it to do so.

I

A

At the outset, the Government contests Major Goldsmith's right to petition this Court for extraordinary relief concerning his sentence, the conditions under which it is served, or the threatened dropping from the rolls. In this connection, the Government emphasizes that Major Goldsmith never petitioned this Court for discretionary review under Article 67, UCMJ, 10 U.S.C. § 867; and it suggests that because of this omission, he is now barred from invoking this Court's jurisdiction.

Our interpretation of the All Writs Act, 28 U.S.C. § 1651(a), is broader than the Government's. Thus, in *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989), we considered a writ-appeal petition that had been submitted by a naval officer being tried by special court-martial. That case could never have reached this Court on direct review because a special court-martial is not empowered to adjudge for an officer a sentence which is eligible for direct review by a Court of Criminal Appeals under Article 66, UCMJ, 10 U.S.C. § 866,[1] and therefore the case could not be

[1] Under Article 66(b)(1), "The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more. . . ." Special courts-martial may not adjudge "death, dishonorable discharge, dismissal, confinement for more than six months. . . ." Art. 19, UCMJ, 10 U.S.C. § 819.

directly reviewed by this Court under Article 67.[2] Our premise in *Unger*, as well as in several other cases,[3] was that Congress intended for this Court to have broad responsibility with respect to administration of military justice.

[2] Article 67 only provides for review by this Court of cases which have been reviewed by a Court of Criminal Appeals.

[3] *See, e.g., United States v. Hardy*, 17 U.S.C.M.A. 100, 37 C.M.R. 364, 1967 WL 4264 (1967) (a petition for review of the validity of a conviction by direct appeal was outside the scope of Article 67); *United States v. Frischholz*, 16 U.S.C.M.A. 150, 151-52, 36 C.M.R. 306, 307-08, 1966 WL 4467 (1966) (Article 67 does not describe the full powers of this Court; rather, the Court also possesses incidental powers as part of its responsibility under the UCMJ to protect the constitutional rights of members of the armed forces); *Gale v. United States*, 17 U.S.C.M.A. 40, 42, 37 C.M.R. 304, 306, 1967 WL 4245 (1967) (Congress intended to grant this Court "supervisory power over the administration of military justice," as well as the authority in certain circumstances to grant relief in pending court-martial proceedings); *United States v. Bevilacqua*, 18 U.S.C.M.A. 10, 39 C.M.R. 10, 1968 WL 5042 (1968) (this Court has the power to grant relief on an extraordinary basis to protect the constitutional rights of servicemembers); *McPhail v. United States*, 1 M.J. 457, 460 (C.M.A. 1976) ("[A]n accused who has been deprived of any fundamental right under the Uniform Code 'need not go outside the military justice system to find relief in the civilian courts of the Federal judiciary'"); *Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982) (this Court granted extraordinary writ directing military judge to dismiss charges and deny authorities the right to prosecute appellant by court-martial as a result of due process violation); *United States Navy-Marine Corps. Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988) (Because this Court is removed from the influences of the Department of Defense and has the power to freely question executive regulation or action, it therefore possesses extraordinary-writ jurisdiction to address unlawful command influence originating with a civilian).

Keeping *Unger* in mind, we conclude that, if this Court is empowered to grant extraordinary relief in a case that it cannot possibly review directly, it is also empowered by the All Writs Act to grant extraordinary relief in a case in which the court-martial rendered a sentence that constituted an adequate basis for direct review in this Court after review in the intermediate court. Moreover, in our view, Goldsmith's failure to petition this Court for discretionary review pursuant to Article 67 did not waive or otherwise affect our extraordinary-writ jurisdiction in connection with this case.

B

Unlike most cases reviewed by this Court or by the Courts of Criminal Appeals, the issue that first gave rise to a petition by Goldsmith for extraordinary relief is not reflected in any way in the record of trial or in the post-trial review. Instead, that issue concerned the manner in which the sentence to confinement was being carried out. Although we doubt that Congress intended for either this Court or the Courts of Criminal Appeals to review details of prison administration, we are persuaded that not every aspect of an appellant's service of a prison sentence imposed by a court-martial is immune from review under the All Writs Act. *See United States v. Coffey*, 38 M.J. 290 (C.M.A. 1993).

For example, if a servicemember under sentence to confinement were kept in confinement by the commandant of a disciplinary barracks after that sentence, as properly computed, had been served, either our Court or the Court of Criminal Appeals would have authority to order a release from confinement, rather than require that the servicemember seek a

writ of *habeas corpus* from a federal district judge in the district where he was confined. Likewise, in view of the prohibition against "cruel or unusual punishment" specifically included in Article 55, UCMJ, 10 U.S.C. § 855, we are convinced that under the All Writs Act either this Court or the Court of Criminal Appeals can grant extraordinary relief against such punishment inflicted upon servicemembers serving a court-martial sentence to confinement—especially when the sentence adjudged was sufficient to authorize review under Articles 66 and 67. Of course, this power should be exercised sparingly because, in most instances, there will be simpler remedies available for an appellant—such as complaints under Article 138, UCMJ, 10 U.S.C. § 938, complaints to the Inspector General of the service involved, or even exercise of a servicemember's statutory right to communicate with his representative in the Congress. *Cf. United States v. Coffey, supra.*

C

In December 1996, Major Goldsmith claimed in his petition that suspension of his HIV medication was life-threatening. If such suspension of needed therapy was imposed as punishment, this would clearly seem "unusual" and probably "cruel" as well.[4] The Court of Criminal Appeals rejected the petition and, having respect for the integrity and competence of military doctors and Army hospitals, we are skeptical as to Major Goldsmith's claims of having been subjected to

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[4] Unlike the Eighth Amendment, Article 55 proscribes "cruel or unusual punishment"—although the caption of the article refers to "cruel and unusual punishments." We need not inquire in this case whether the Code's difference in phrasing has any practical significance.

vindictive or retaliatory medical treatment while he was at Fort Leavenworth. In any event, petitioner's release from confinement has now mooted his claim as to improper medical treatment. However, when he initially petitioned this Court in January 1997, the issue was still open as to whether he had been subjected to a life-endangering deprivation of medicines needed to combat his HIV-positive condition. Therefore, having previously presented that issue to the Court of Criminal Appeals as called for by our Rules of Practice and Procedure, Major Goldsmith was entitled to bring that same issue to this Court by means of a writ-appeal petition.

The Government complains, however, that unlike the issue concerning medical treatment, the issue as to the Air Force's intended dropping of Major Goldsmith from the rolls has not previously been raised in the Court of Criminal Appeals. According to the Government, a separate petition on this matter should have been submitted initially to the Court of Criminal Appeals.[5]

Although we recognize the importance of an orderly progression of a case to our Court through an intermediate court and acknowledge the great value of receiving that court's views, our rules of appellate procedure are not ironclad in that regard and specifically recognize that there may be "good cause" to

[5] Under Rule 4(b)(1), Rules of Practice and Procedure, United States Court of Appeals for the Armed Forces, "Absent good cause, no such petition [for an extraordinary writ] shall be filed unless relief has first been sought in the appropriate Court of Criminal Appeals."

submit a petition initially to this Court.[6] Indeed, quite recently we entertained a petition by the news media for an extraordinary writ to direct that an investigation under Article 32, UCMJ, 10 U.S.C. § 832, be opened to the public, even though the petition had not been submitted previously to the Army Court of Criminal Appeals. *ABC, Inc. v. Powell*, 47 M.J. 363 (1997).

While filing in the Court of Criminal Appeals in this case was permissible and might have been preferable, we disagree with the Government's contention that it was necessary. Therefore, just as in *ABC*, we decline to require filing a new petition in the Court of Criminal Appeals or to remand the existing petition for consideration by that court. Furthermore, consistent with the concept of "pendent jurisdiction"—which on at least one occasion has been advocated by the Government, *cf. United States v. Lockwood*, 15 M.J. 1 (C.M.A. 1983)—we conclude that Major Goldsmith's proper filing in this Court of a writ-appeal petition as to suspension of necessary medications allowed him to "piggyback" thereon, by also submitting a petition for extraordinary relief to this Court, wherein he not only contested suspension of medications, but also raised initially the issue of lawfulness of dropping him from the rolls of the Air Force. *See generally United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725, 86 S. Ct. 1130, 1138, 16 L.Ed.2d 218 (1966).

In *United States v. Gorski*, 47 M.J. 370 (1997), we adverted to judicial economy. Consolidation of issues

[6] In any event, our rules of appellate procedure do not limit the jurisdiction of this Court. *See* Rule 4(c).

and parties in a single proceeding is a customary way to expedite disposition of multiple issues in contention between the same parties or different parties. *Cf.* Fed. R. Civ. P. 18, 28 U.S.C. Consolidation of multistate litigation is another of many examples of this trend in the judicial process. With this in mind, we recognize that, in view of the stage of proceedings that had been reached in January 1997 as to the issue of life-endangering deprivation of medical treatment, considerable justification existed for Major Goldsmith's not filing initially in the court below his petition for extraordinary relief concerning the threatened dropping from the rolls. The All Writs Act contains no limitation of our power to consider a petition for extraordinary relief that has not been initially submitted in a Court of Criminal Appeals; and we see no reason to construe our Rules to require, in this case, a procedure that might produce delay and fragmentation.

D

The Government also claims that Major Goldsmith waited too long to submit a petition for extraordinary relief to prevent the threatened dropping from the rolls because such a petition must be filed "no later than 20 days after the petitioner learns of the action complained of." Rule 19(d) of our Rules of Practice and Procedure. According to the Government, this "action" was a notice to Major Goldsmith of the intent to drop him from the rolls.[7] This contention is somewhat at odds with the Government's contention that the issue of dropping Goldsmith from the rolls is not yet ripe for consideration by this Court and that this Court should await the taking of further administrative action. Although we recognize that it is a waste of judicial time to consider issues that are academic and may be mooted by failure to take administrative action, we also conclude that—at least by now—the Air Force's intent to drop Major Goldsmith from the rolls has been manifested sufficiently to warrant both his submission of a petition for extraordinary relief and our consideration of that petition. On the other hand, we do not believe the 20-day period prescribed by our Rules for filing the petition had run at the time it was filed in this Court.[8]

[7] Under the applicable Air Force Instruction, a notice is given to the person who is being considered for the dropping from the rolls, and that person then has 10 days to submit a response. Para. 4.2.3, Air Force Instruction 36-3207 (1 September 1996).

II

At this point, we finally encounter the substantive question of the lawfulness of applying retroactively to Major Goldsmith a statutory amendment which took effect after his trial and conviction. Pub. L. No. 104-106, 110 Stat. 186—which also created Article 58b, UCMJ, 110 U.S.C. § 858b (§ 1122, 110 Stat. 463), that this Court considered in *Gorski*—added a new ground for dropping a commissioned officer from the rolls of any armed force (§ 563(b)(1), 110 Stat. 325). Prior to enactment of the amendment, which took effect on February 10, 1996, the President was authorized to drop from the rolls any commissioned officer "who has been absent without authority for at least three months" or "who is sentenced to confinement in a

[8] In any event, the 20-day provision in our Rule does not deprive this Court of jurisdiction to consider the petition; and the All Writs Act contains no such limitation on our jurisdiction.

Federal or State penitentiary or correctional institution after having been found guilty of an offense by a court other than a court-martial or other military court. . . ." Act of Aug. 10, 1956, ch. 1041, § 1, 70A Stat. 89. After enactment of the amendment, the President could also "drop from the rolls . . . any commissioned officer . . . who may be separated under [10 U.S.C.] § 1167 . . . by reason of a sentence to confinement adjudged by a court-martial." *See* 10 U.S.C. § 1161(b)(2). Section 1167 of Title 10—which was also added by Pub. L. No. 104-106—states:

> Except as otherwise provided in regulations prescribed by the Secretary of Defense, a member sentenced by a court-martial to a period of confinement for more than six months may be separated from the member's armed force at any time after the sentence to confinement has become final under chapter 47 of this title and the member has served in confinement for a period of six months.

§ 563(a)(1)(A), 110 Stat. 325.

Construing together §§ 1161 and 1167, we conclude that a commissioned officer sentenced by court-martial to more than 6 months' confinement may be dropped from the rolls—and thereby separated from the officer's armed force[9]—at any time after that sentence has become final, upon completion of any appellate review, and after service of confinement for

[9] According to paragraph 4.1.1, Air Force Instruction 36-3207, dropping from the rolls, in the present context, signifies termination of military status. In other contexts, dropping from the rolls may only refer to removal from the rolls of a particular unit.

6 months. Of course, termination of military status would carry with it termination of any entitlement to pay and allowances.

Major Goldsmith maintains that application to him of the statutory amendment concerning dropping from the rolls violates the *Ex Post Facto* Clause of the Constitution because it applies a new punishment to conduct that took place prior to enactment of the statute which authorized such punishment. We have considered—and upheld—in *Gorski* a similar contention with respect to Article 58b, which was also created by Pub. L. No. 104-106. We note that the double jeopardy prohibition is also involved because, as the Supreme Court has recently pointed out, "Although generally understood to preclude a second prosecution for the same offense, the Court has also interpreted this prohibition [the Double Jeopardy Clause] to prevent the State from 'punishing twice, or attempting a second time to punish criminally, for the same offense.'" *See Kansas v. Hendricks*, ——U.S. ——, ——, 117 S. Ct. 2072, 2085, 138 L.Ed.2d 501 (1997), quoting *Witte v. United States*, 515 U.S. 389, 396, 115 S. Ct. 2199, 2204, 132 L.Ed.2d 351 (1995). Here, if Goldsmith's position is correct, a second "punishment" was being imposed upon him by Congress after he had already been tried and sentenced.

The Government insists that dropping from the rolls is only an "administrative" matter and does not concern punishment. This contention parallels the claim successfully made in *Hendricks* by the State of Kansas that civil commitment as a sexual predator was not "punishment" for purposes of the double jeopardy or *ex post facto* prohibitions—even though the commitment was triggered by charge or conviction of

sexually violent conduct. Certainly to some extent, *Hendricks* supports the Government's position. For example, the label of "civil" used by the Kansas legislature was significant in persuading the Supreme Court that the commitment was not designed to be punitive. —— U.S. at ——, 117 S. Ct. at 2081-82.

In the present case, the provision as to dropping from the rolls was not labeled "punishment" and, unlike the amendment considered in *Gorski*, was not included in the UCMJ. Instead, it is part of a chapter of Title 10 which concerns "Personnel." On the other hand, the amendment to 10 U.S.C. § 1161 and addition of 10 U.S.C. § 1167 are contained in the same public law that adds Article 58b and, taken in context, can be viewed as part of a package designed to deal with the same congressional concern that motivated passage of the "punitive" Article 58b. Indeed, termination of an officer's military status by dropping from the rolls—a termination resulting from punitive action taken pursuant to the UCMJ—would have the same effect of terminating pay that is imposed by Article 58b. Moreover, in terms of the context in which the recent provision for dropping from the rolls appears and the reference to dropping from the rolls in Article 4(d), UCMJ, 10 U.S.C. § 804(d), there is an associated stigma very akin to that involved in "punishment." Although the issue is a close one, we conclude that in order fully to accomplish the purposes of the *Ex Post Facto* and Double Jeopardy Clauses, we should treat this amendment as punitive and hold that it cannot be applied to Major Goldsmith.[10]

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[10] We have considered the recent Supreme Court decision in *Hudson v. United States*, — U.S. ——, 118 S. Ct. 488, 139 L.Ed.2d 450 (1997)(holding that the Double Jeopardy Clause does not bar criminal indictment following administratively imposed monetary penalties and occupational debarment for violation of federal banking statutes because the administrative proceedings were "civil" not "criminal"), which was decided after argument of this case. Despite its relevance to the issues before us, we are still of the view that, under all the circumstances surrounding enactment of Pub. L. No. 104-106, the provision for "dropping from the rolls" was "punitive" for purposes of the Double Jeopardy Clause and, *a fortiori*, for purposes of the *Ex Post Facto* Clause.

The writ-appeal petition is denied as moot.

The petition for extraordinary relief is granted. No action may be taken to drop Major Goldsmith from the rolls pursuant to the amendment to 10 U.S.C. § 1161.

Judge EFFRON did not participate.

COX, Chief Judge (concurring):

I write only to respond to Judge Gierke's dissent. He is, of course, correct that the action of dropping an officer from the rolls of the Air Force is an "administrative action." In that sense, the issuance of a Department of Defense (DD) Form 214 to an officer who has been dismissed by a sentence of a court-martial is an administrative action. Thus, the Secretary of the Air Force may not drop an officer from the rolls in this circumstance without a sentence to confinement nor can he issue a DD Form 214 showing dishonorable service without a sentence to dismissal. Where Judge Gierke's opinion fails, in my judgment, is that he does not address the linkage between the sentence of the court-martial and the administrative action in the context of *ex post facto* laws. The only question presented by this case is whether the adoption of 10 U.S.C. § 1167 has *ex post facto* application to Major

Goldsmith. Because it was enacted many months after his court-martial sentence had been adjudged, I concur with Senior Judge Everett that as to this appellant, the application of the statute is clearly *ex post facto*.

Judge Gierke's opinion also raises significant questions in my mind. For example, if 10 U.S.C. § 1167 is purely administrative in nature, does the servicemember have recourse to the Air Force Board for Correction of Military Records to attack his court-martial conviction? Judge Gierke equates the action in this case to "a decision to not promote the officer, to reassign the officer, to revoke the officer's security clearance, or to administratively separate the officer." Thus, I assume he would give the servicemember analogous remedies to correct administrative errors. On the other hand, perhaps Congress has created a situation where an officer is left totally exposed to the whimsical attitude of the Secretary concerned? My view is that Congress appropriately tied the Secretary concerned to the court-martial sentence with all of the attendant due process rights and judicial review.

The nexus between the court-martial process and the subsequent administrative action is so totally complete and intertwined that Congress clearly intended that the Secretary could only act under this statute pursuant to a proper conviction and sentence. Having said all of this, however, I am also convinced that once this Court has completed its review, the decision of the Secretary is totally discretionary. In this case, our jurisdiction extends only to the Constitutional *ex post facto* question. I entertain no thought of venturing beyond the limits of this

appropriate exercise of jurisdiction. *See Unger v. Ziemniak*, 27 M.J. 349, 359 (C.M.A. 1989) (Cox, J., concurring in part).

SULLIVAN, Judge (concurring):

I join the excellent opinion of my Brother, Judge Everett, and only write to highlight the fact that our Court must be accountable and responsible enough to step forward to correct the effect of this law which increased the punishment of Major Goldsmith. We should use our broad jurisdiction under the Uniform Code of Military Justice to correct injustices like this and we need not wait for another court to perhaps act. As was said in Isaiah 6:8:

> Also I heard the voice of the Lord, saying, '***Whom shall I send***, and who will go for us?' Then said I, '***Here am I; send me***.'

(Emphasis added.)

Our Court has the responsibility of protecting the rights of all servicemembers in court-martial matters. We should not shirk from this duty when a "second punishment," directly tied to his court-martial, is imposed on Major Goldsmith by an *ex post facto* law issued after his court-martial.

GIERKE, Judge, with whom CRAWFORD, Judge, joins (dissenting):

In my view 10 USC § 1167 pertains to a collateral administrative consequence of Major Goldsmith's sentence that may or may not occur. This Court has no jurisdiction over administrative personnel actions.

Unlike Articles 57 and 58, UCMJ, 10 U.S.C. §§ 857 and 858, respectively, at issue in *United States v. Gorski*, 47 M.J. 370 (1997), § 1167 is not part of the

Uniform Code of Military Justice but, instead, is part of the United States Code pertaining to personnel matters. Also unlike Articles 57 and 58, which make forfeitures and reduction mandatory, 10 U.S.C. § 1167 is merely an enabling statute for a discretionary action that may or may not occur. It merely provides that Major Goldsmith "*may* be separated." (Emphasis added.)

Dropping an officer from the rolls (DFR) traditionally has been treated as an administrative measure separate from the court-martial. *See* Article of War 118, reprinted in Manual for Courts-Martial, U.S. Army, 1917, at 328; Article for the Government of the Navy (AGN) 38, reprinted in Naval Courts and Boards, 1937, at 465. In 1930, the Attorney General interpreted the congressional intent behind AGN 38 as

> not to impose additional punishment upon naval officers convicted of crime, but rather to promote the efficiency of the Navy and to maintain the high standard of its officer personnel by providing that officers who fail to maintain a certain standard of conduct may be dropped from the rolls and rendered ineligible for reappointment.

36 U.S. Op. Att'y Gen. 186, 188. Colonel Winthrop explained the purpose of dropping an officer from the rolls as follows:

> [T]he authority to drop is a special power conferred by Congress for the purpose of relieving the army of a useless member who has himself practically abandoned it, and the treasury from the obligation of paying for services no longer rendered. . . .

W. Winthrop, *Military Law and Precedents* 746 (2d ed. 1920 reprint) (footnotes omitted).

In *Helmich v. Nibert*, 543 F. Supp. 725; 728 (D. Md. 1982), the court said that DFR "is purely a nondisciplinary administrative action which carries no connotations, good or bad. . . ." In *Pickell v. Reed*, 326 F. Supp. 1086, 1089-90 (N.D. Cal. 1971), the court drew a distinction between punitive and administrative actions and said:

> So long as an administrative discharge is not used as a disguise for punitive action, the military remains within proper bounds when it chooses to grant an administrative discharge without pressing for a court martial because of the individual's wrongful conduct.

In my view DFR is an administrative personnel decision, in the same category as a decision to not promote the officer, to reassign the officer, to revoke the officer's security clearance, or to administratively separate the officer for substandard performance. It is an action that does not flow from a court-martial sentence as a matter of law. Instead, the court-martial sentence is merely the basis on which the DFR action may be based, and it may or may not occur. I believe that we have no jurisdiction to interfere. Accordingly, I dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

USCA Misc. Dkt. No. 97-8012/AF
Crim. App. Dkt. No. 96-14

JAMES T. GOLDSMITH (449-23-0792),
PETITIONER/APPELLANT

v.

PRESIDENT WILLIAM J. CLINTON;
SECRETARY OF DEFENSE WILLIAM COHEN;
SECRETARY OF THE AIR FORCE SHEILA WIDNALL;
SECRETARY OF THE ARMY TOGO WEST;
LT. GENERAL JOHN C. GRIFFITH,
VICE COMMANDER, HQ AIR EDUCATION &
TRAINING COMMAND, RANDOLPH AFB, TEXAS;
COLONEL MARVIN NICKLES, COMMANDANT,
U.S. DISCIPLINARY BARRACKS, AND
COLONEL GATRELL, COMMANDER,
MUNSON ARMY HOSPITAL, BOTH OF
FORT LEAVENWORTH, KANSAS,
RESPONDENTS/APPELLEES

ORDER

On consideration of petitioner's motion to stay completion of a proceeding to drop petitioner from the rolls, it is, by the Court this 25th day of August, 1997,

ORDERED;

That said motion is granted and;

That said proceeding by stayed until further order of the Court.

For the Court,

/s/ JOHN A. CUTTS, III
Deputy Clerk of the
Court

Judge Effron did not participate in the disposition of this motion.

cc: The Judge Advocate General of the Air Force
Respondents
Appellate Defense Counsel (ECONOMIDY, Esq.)
Appellate Government Counsel (BRESLIN)

APPENDIX C

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Misc. No. 96-14
Panel No. 1

MAJOR JAMES T. GOLDSMITH, 449-23-0792,
U.S. AIR FORCE, INMATE,
U.S. DISCIPLINARY BARRACKS,
FORT LEAVENWORTH KANSAS 66027, PETITIONER,

v.

COLONEL MARVEN NICKELS, COMMANDANT,
U.S. DISCIPLINARY BARRACKS, COLONEL
GATRELL, COMMANDER MUNSON ARMY HOSPITAL,
SECRETARY OF DEFENSE WILLIAM PERRY,
AND SECRETARY OF THE ARMY TOGO WEST,
RESPONDENT

[Jan. 9, 1997]

PETITION FOR EXTRAORDINARY RELIEF

Before: DIXON, SCHREIER, and STARR Appellate Military Judges

PER CURIAM:

Petitioner is here seeking extraordinary relief. He is currently serving a sentence of confinement at the United States Disciplinary Barracks at Fort Leavenworth, Kansas. His conviction and sentence were affirmed by this Court on 20 November 1995. He complains that prison officials are not maintaining and administering medications which he needs as a HIV-positive inmate. Petitioner alleges that the medications had been prescribed by a military physician to enable him to combat infections. For the reasons set forth below, we decline to issue extraordinary relief.

This Court's statutory mandate under Article 66, UCMJ, is to review courts-martial in which the approved sentence includes death, dismissal, dishonorable or bad-conduct discharge, or confinement for one year or more. In those cases, we may affirm only such findings of guilty or approved sentences as we find correct in law and fact.

In addition to our statutory mandate, this Court may entertain petitions for extraordinary writs in appropriate cases. Our power to grant extraordinary relief derives from the All Writs Act, 28 U.S.C. § 1651(a). That Act specifically authorizes federal courts to issue writs necessary or appropriate in aid of their respective jurisdictions. *United States v. Dettinger*, 7 M.J. 216 (C.M.A. 1979).

Unless the extraordinary relief requested involves a matter which is necessary and appropriate in aid of our statutory jurisdiction, we lack the authority to act. Having reviewed his petition, we find no authority to act on petitioner's request. Our appellate juris-

diction does not extend to the review of medical determinations made by officials at the United States Disciplinary Barracks. Accordingly, the petition is

DENIED.

[seal omitted]

OFFICIAL

/s/ ROXANE M.G. PORTER
ROXANE M.G. PORTER
Staff Sergeant, USAF
Chief Court
Administrator

APPENDIX D

[seal omitted]

DEPARTMENT OF THE AIR FORCE
AIR EDUCATION AND TRAINING COMMAND

27 NOV 1996

MEMORANDUM FOR MAJOR JAMES T. GOLDSMITH

FROM: AETC/CV
1 F Street Suite 1
Randolph AFB TX 78150-4324

SUBJECT: Notification of Intent to Drop An Officer from the Rolls of the Air Force, Major James T. Goldsmith, 449-23-0792FR, Lackland AFB TX

1. In accordance with Section 563 of the National Defense Authorization Act of 1996 and AFI 36-3207, para 4.2.3, you are hereby notified that I am initiating action to drop you from the rolls of the Air Force.

2. I am taking this action for the following reasons:

a. On 4 Mar 94, you were convicted at a general court-martial of the following offenses:

(1) Two specifications of willful violation of Colonel John P. Tagnesi's 31 May 88 order directing you to inform your sexual partners of your HIV status before having sexual intercourse and to use proper methods, including condoms, to prevent transmission of your seminal fluids by engaging in vaginal intercourse with Ms. Debora A. Smith and 1Lt. Katherine

A. Strus. This conduct is a violation of Article 90 of the Uniform Code of Military Justice;

(2) Two specifications of assault with a means likely to produce grievous bodily harm in that you had unprotected sexual intercourse with Ms. Debora A. Smith and 1Lt. Katherine A. Strus while knowing that you were HIV positive and failing to disclose to either woman that you were infected with this disease. This conduct is a violation of Article 128 of the Uniform Code of Military Justice; and

(3) One specification of assault consummated by a battery upon 1Lt. Katherine A. Strus in her capacity as a commissioned officer in the United States Air Force. This conduct is a violation of Article 128 of the Uniform Code of Military Justice.

b. You have been in confinement for more than six months and your conviction has become final.

3. If the Secretary of the Air Force approves my recommendation, you will be discharged from the Air Force; however, your service will not be characterized. Additionally, you will not receive any discharge paperwork, you will no longer receive military pay, and you will not be eligible for any veteran benefits. You have ten calendar days from the receipt of this memorandum to submit a response. I will consider any matters you choose to submit and will forward your materials, along with my recommendation, to the SECAF who will make the final decision in this case.

4. Sign and date the attached memorandum of acknowledgment immediately upon receiving this notification memorandum. Give one copy of the acknowledgment memorandum to the officer presenting this

notification memorandum to you. If you decline to acknowledge receiving this notification memorandum, the officer presenting it to you will record the date and time that you declined to acknowledge receipt. The notification and acknowledgement memorandum will become a part of your case file.

/s/ JOHN C. GRIFFITH
JOHN C. GRIFFITH
Lieutenant General,
USAF
Vice Commander

Attachment:
Letter of Acknowledgment

[seal omitted]

DEPARTMENT OF THE AIR FORCE
AIR EDUCATION AND TRAINING COMMAND

MEMORANDUM FOR AETC/CV

FROM: MAJOR JAMES T. GOLDSMITH, 429-23-0792FR, 37 TRS/CE

SUBJECT: Acknowledgment of Initiation of Action to Drop From Rolls of the Air Force

1. I acknowledge receiving AETC/CV's memorandum notifying me he is initiating action to drop me from the rolls of the Air Force. I received this notification at _____ on _____.

2. I understand I must endorse this acknowledgment of notification upon receipt and submit any response I care to make within ten calendar days of receipt of your notification memorandum. I also understand that if I am dropped from the rolls of the Air Force my service will not be characterized, I will not receive any discharge paperwork (including a DD Form 214),

I will no longer receive any military pay, and that I will not be eligible for any veteran benefits.

JAMES T. GOLDSMITH,
Major, USAF
449-23-0792FR

/s/ CHARLES L. HENSON
CHARLES L. HENSON,
SMSgt, USAF

APPENDIX E

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

MAJOR JAMES T. GOLDSMITH, FR449-23-0792
UNITED STATES AIR FORCE

ACM 31172

20 November 1995

Sentence adjudged 4 March 1994 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Dennis E. Kansala.

Approved sentence: Confinement for 6 years and forfeiture of $2,500 pay per month for 72 months.

Appellate Counsel for Appellant: Colonel Jay L. Cohen and Captain J. Knight Champion, III.

Appellate Counsel for the United States: Colonel Jeffery T. Infelise, Colonel Thomas E. Schlegel, and Captain Timothy G. Buxton.

Before

SCHREIER, STARR, and CREGAR
Appellate Military Judges

CREGAR, Judge:

Contrary to his pleas appellant was convicted of two specifications of willful disobedience of the order of a superior commissioned officer, two specifications of assault with a means likely to inflict death or grievous bodily harm, and one specification of assault consummated by a battery.[11] Articles 90 and 128, UCMJ, 10 U.S.C. §§ 890 and 928 (1988). A general court martial consisting of members sentenced him to confinement for six years and forfeiture of $2,500 pay per month for 72 months.

Appellant received an order by a superior commissioned officer to inform his sex partners that he was HIV (human immune deficiency virus) positive before engaging in sexual relations and to employ methods, including condoms, to prevent the transfer of body fluids during sexual relations. He was convicted of the assaults and of having violated this order by engaging in unprotected sexual intercourse with two women without first informing them that he was HIV positive. He assigns three errors: that the evidence was factually insufficient to establish that there was more than a remote possibility that HIV could be transmitted through unprotected vaginal intercourse without internal ejaculation; that the military judge erred in denying a defense motion for a new Article 32 investigation; and that the sentence is inappropriately severe. Finding no merit to these assignments of error, we affirm.

---

[11] Appellant had been charged with a specification of assault on a superior commissioned officer. The members acquitted him of the greater offense and convicted him of the lesser included offense of assault consummated by a battery.

I. FACTUAL SUFFICIENCY

Appellant was diagnosed as having HIV in April 1988 and, on May 31, 1988, received the preventive medicine order described above from Colonel John P. Tagnesi, his superior commissioned officer. He also attended several counselling sessions concerning his responsibilities to inform any sex partners of his HIV status and to use protective measures if the partners consented to engage in sex with him. Persons with HIV eventually contract AIDS (Acquired Immune Deficiency Syndrome), a disease which is invariably deadly and for which there is no cure.

Appellant met Debora S in October 1988. They engaged in multiple instances of unprotected vaginal intercourse during November of 1988 and January of 1989. Appellant did not tell her that he was HIV positive. Instead, he told her that he was suffering from leukemia. The record does not establish whether appellant ever ejaculated in Ms. S's vagina.

Appellant met First Lieutenant (1st Lt) S in October 1993. They engaged in both protected and unprotected vaginal intercourse approximately 10 times. On those occasions when the intercourse was unprotected, appellant withdrew before ejaculation. At no time did he tell her that he was HIV positive. Appellant told 1st Lt. S that he was terminally ill with cancer of the lymph nodes and, in response to her direct question as to whether he was HIV positive,[12] denied that he was HIV positive. Rather, he said that "I told her I was 'false positive' once, but that's not

[12] 1st Lt. S had learned that appellant was unable to deploy world wide. Thus, it occurred to her to ask him if this was because he had AIDS.

the case anymore." 1st Lt. S did not conclude from this response that he was HIV positive. Indeed, she testified that appellant claimed that the false positive test was the result of his cancer of the lymph nodes.

There is no evidence that appellant's pre-ejaculate contained HIV. In subsequent tests neither Debora S nor 1st Lt. S has tested positive for HIV.

Appellant asserts that the evidence is factually insufficient to support his conviction for aggravated assault based on the lack of direct evidence that his pre-ejaculate fluid actually contained HIV. He relies on the expert testimony of Dr. (Major) Blatt to the effect that little is known of about the amount of HIV in pre-seminal as opposed to seminal fluid; that appellant's tests reveal that his low concentration of the virus make him less likely to have the virus in his seminal fluid; and that the risk of transmission from a male to female in vaginal intercourse is only one in one thousand. He further argues that neither Debora S nor 1st Lt. S had a coexisting sexual disease which would have increased the risk of transmission, and that neither has tested positive for HIV. Based on this evidence appellant asserts that the prosecution has failed to establish that the likelihood of infecting these two women under these circumstances was "more than merely a fanciful, speculative, or remote possibility." *United States v. Johnson*, 30 M.J. 53, 57 (C.M.A.), *cert. denied*, 498 U.S. 919 (1990).

The test for factual sufficiency is whether, weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of this Court are themselves convinced of the accused's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325

(C.M.A. 1987); Article 66, UCMJ, 10 U.S.C. § 866. Affirming the conviction of an HIV positive sailor who engaged in protected vaginal intercourse without informing his partner that he was HIV positive, the former Court of Military Appeals stated:

> . . . [W]e do not construe the word "likely," in the phrase, "likely to produce death or grievous bodily harm," as involving nice calculations of statistical probability. (Footnote omitted.) If we were considering a rifle bullet instead of HIV, the question would be whether the bullet is likely to inflict death or serious bodily harm *if* it hits the victim, not the statistical probability of the bullet hitting the victim. The statistical probability need only be "more than merely a fanciful, speculative, or remote possibility," *United States v. Johnson*, 30 M.J. 53, 57 (C.M.A.), *cert. denied*, 498 U.S. 919, 111 S. Ct. 294, 112 L.Ed. 2d 248 (1990).
>
> Likewise, in this case, the question is not the statistical probability of HIV invading the victim's body, but rather the likelihood of the virus causing death or serious bodily harm *if* it invades the victims's body. The probability of infection need only be "more than merely a fanciful, speculative, or remote possibility." *Id.*

United States v. Joseph, 37 M.J. 392, 396-7 (C.M.A. 1993) (emphasis in original).

> In a footnote to the *Joseph* opinion the Court stated:
>
> We have held that the natural and probable consequence of having *unprotected* sexual contact with someone who tests positive for HIV is death or serious bodily harm. (Citations omitted.) Thus, deliberately exposing another to seminal fluid containing HIV is clearly a means likely to produce death or grievous bodily harm and, therefore, can be an aggravated assault.

Id. at 396, n.6 (emphasis in original).

Appellant argues that, unlike the instant case, there was expert testimony in *Joseph* that it was more than mere speculation that HIV could be transmitted through vaginal intercourse, and that Joseph knew that condoms did not provide absolute protection. He claims that he did not know nor, based on the expert testimony, was there reason to believe that his pre-ejaculate contained the virus. We disagree.

Dr. Blatt acknowledged a "probability" that not all men may have HIV in their pre-seminal fluid, and that the risk of transmission from a male to a female in unprotected intercourse is one in a thousand per encounter. However, he also stated that there is very little known about the *amount* of virus in pre-seminal fluid versus seminal fluid and that "*it is thought that the pre-seminal fluid potentially may be infectious.*" Another expert witness, Dr. (Major) Hendris, testified that it would be reckless for the withdrawal method to be used in preference to protected sex and that the risk of heterosexual, penile-vaginal transmission of HIV is a very real threat.[13]

---

[13] Indeed, there was no evidence of internal ejaculation in the single sexual encounter involved in the *Joseph* case, yet Joseph's sexual partner contracted the HIV, evidently from this single encounter. Although Joseph used a condom, it tore while he was engaging in vaginal intercourse.

Because appellant's arguments are ultimately based upon the amounts of any HIV in his pre-ejaculate and the likelihood of transmission once penetration has occurred, they in fact address the statistical probability of the transmission of the virus rather than the likelihood of death or serious bodily harm once the virus has been transmitted. These arguments are foreclosed by the holding in *Joseph*. We conclude that the "very real threat" of heterosexual HIV transmission arose when unprotected penile-vaginal penetration occurred. Accordingly, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt of the accused's guilt of assault with a means likely to inflict grievous bodily harm on Debora S and 1st Lt. S.

II. DENIAL OF A NEW ARTICLE 32 INVESTIGATION

Prior to the Article 32 investigation, appellant requested the presence of Debora S. The investigating officer denied the request having determined that she was unavailable because she was physically more than 100 miles away. Her testimony was, however, obtained over the telephone and the defense had the opportunity to cross-examine her. At trial the military judge denied a defense motion for a new Article 32 investigation based upon the Investigating Officer's determination. Debora S testified at the trial and was cross examined.

At no time prior to the trial did the defense request to take Debora S's deposition. Accordingly, we conclude that appellant waived this asserted error on the part of the Investigating Officer. *United States v. Chuculate*, 5 M.J. 143, 145-46 (C.M.A. 1978); *United States v. Marrie*, 39 M.J. 993, 998 (A.F.C.M.R. 1994), *aff'd*, 43 M.J. 35 (1995).

III. SENTENCE APPROPRIATENESS

Appellant is unlikely to outlive his sentence to confinement for six years with the result that he will be deprived of an opportunity to spend any portion of the brief remainder of his life with his two children in a conventional setting.

We recognize and regret the ordeal which appellant and his family face. However, the offenses for which appellant was convicted evidence a total disregard for his responsibilities as an officer and evidence a callous disregard for the lives of his sexual partners. For these offenses he could have been sentenced to a dismissal, total forfeitures, and confinement for 10 years.[14] We have also given individualized consideration to evidence of the impact of his conduct upon his sexual partners, appellant's character of service, and those matters submitted by appellant during sentencing and clemency. After consideration of these matters, we find that the sentence is not inappropriately severe. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982).

We conclude that the findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantive rights of the appellant occurred. Accordingly, the findings of guilty and the sentence are

---

[14] The military judge determined that the Article 90 and Article 128 specifications were multiplicious for sentencing purposes.

AFFIRMED.

Senior Judge SCHREIER and Judge STARR concur.

[seal omitted]

/s/ ALVIN J. STRIBLING
ALVIN J. STRIBLING
Technical Sergeant, USAF
Chief Court Administrator

APPENDIX F

1. Section 866 of Title 10, United States Code, provides in relevant part:

(b) The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial–

(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and

(2) except in the case of sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

2. Section 867 of Title 10, United States Code, provides:

(a) The Court of Appeals for the Armed Forces shall review the record in–

(1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and

(3) all cases reviewed by a Court of Criminal appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(b) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of–

(1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

(2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record.

The Court of Appeals for the Armed Forces shall act upon such a petition promptly in accordance with the rules of the court.

(c) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

3. Section 1161(b) of Title 10, United States Code provides:

> The President may drop from the rolls of any armed force any commissioned officer (1) who has been absent without authority for at least three months, (2) who may be separated under section 1167 of this title by reason of a sentence to confinement adjudged by a court-martial, or (3) who is sentenced to confinement in a Federal or State penitentiary or correctional institution after having been found guilty of an offense by a court other than a court-martial or other military court, and whose sentence has become final.

10 U.S.C. 1161(b).

4. Section 1167 of Title 10, United States Code, in relevant part provides:

> Except as otherwise provided in regulations prescribed by the Secretary of Defense, a member sentenced by court-martial to a period of confinement for more than six months may be separated from the member's armed force at any time after the sentence to confinement has become

> final * * * and the member has served on confinement for a period of six months.

10 U.S.C. 1167.

5. Section 1651(a) of Title 28, United States Code, provides:

> The Supreme Court and all courts established by an Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

6. Article I, Section 9, Clause 3, of the United States Constitution provides that "[n]o ex post facto Law shall be passed."

7. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."